IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

TERRY LYNCH and BARBARA LYNCH,	:	
Plaintiffs,	:	
v.	:	C.A. No. S09C-12-008-RFS
MANDRIN HOMES OF DELAWARE, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION

Upon Defendant's Motion to Dismiss. Denied

Submitted: March 5, 2010
Decided: March 9, 2010

Joseph C. Raskauskas, Esquire, Bethany Beach, Delaware, Attorney for Plaintiffs.

K. William Scott, Esquire, Scott and Shuman, LLC, West Fenwick, Delaware, Attorney for Defendant.

STOKES, J.

This action arises from a failure by Defendant Mandrin Homes of Delaware, LLC, ("Mandrin") to purchase a parcel of real estate belonging to Plaintiffs Terry Lynch and Barbara Lynch ("Lynch") pursuant to a Purchase and Sale Agreement ("Agreement"), as amended by a First, Second and Third Amendment. Pending before the Court is Defendant's Motion to Dismiss the Complaint, and this is the Court's decision denying said motion.

Facts

On or about July 8, 2004, Lynch and Mandrin entered into the above- referenced Agreement. Lynch agreed to sell, and Mandrin agreed to buy, a 27-acre parcel of land ("the Property") owned by Lynch for a Purchase Price of $5 million. Pursuant to the Agreement, Mandrin paid as a deposit the sum of $75K into an escrow account. Mandrin intended to develop the Property into a residential community. The Agreement provided Mandrin with time to conduct a feasibility study and also provided Mandrin with the right to rescind the Agreement if it was found not to be feasible to build a community. The results of the study were positive, and Mandrin did not rescind the Agreement. However, settlement did not take place on schedule.

Mandrin asked for and received an extension for the settlement date. Under the First Amendment, Mandrin paid Lynch an "additional deposit" of $75K for the closing date extension, and closing was extended to December 15, 2006. The First Amendment also provided that Mandrin would pay an additional deposit of $75K six months from the

ratification of the First Amendment. Settlement did not take place on December 15, 2006, and Lynch asked for and received an additional extension, which was provided for in the Second Amendment, dated January 22, 2007. Mandrin agreed to pay and did pay Lynch a monthly sum of $12,500 from January 15, 2007 through June 15, 2007, which payments were to be credited toward the Purchase Price. Mandrin also paid Lynch a monthly sum of $12.5K from July 15, through December 15, 2007, which sums were **not** to be credited toward the Purchase Price but were consideration for Lynch's agreement to extend the closing date. Settlement did not occur on December 15, 2007.

Mandrin asked for another extension for settlement and also for a decrease in the Purchase Price from $5MM to $3.5MM, and Lynch agreed. The parties entered into a Third Amendment, which provides that the $375K[1] Mandrin had thus far paid would be credited toward to the Purchase Price. It also acknowledged payment of two monthly installments of $12.5K for July and August 2007, which were consideration for the extension of the closing date and were paid in addition to the Purchase Price. The Third Amendment decreased the Purchase Price from $5MM to $3.5MM, and Mandrin agreed to pay Lynch $2K for September, October, November, December 2007 and January 2008 upon the signing of the Third Amendment, sums which would not be credited toward the

[1]The ambiguity of this contract is reflected in the terms of the Second and Third Amendments. The Second Amendment provides for Buyer to pay Seller $75K for the months of January through June 2007, an amount which was to be credited toward the Purchase Price, and an additional $75K for the months July through December 2007, which was not to be credited toward the Purchase Price. The Third Amendment glosses over this distinction and refers to the entire deposit amount of $375K as being credited toward the Purchase Price.

Purchase Price but were in addition to it. Beginning February 2008, Mandrin agreed to pay $2k per month through the closing date of August 1, 2008. If closing did not occur by that time, the date would be automatically extended to December 31, 2008 and Mandrin would in consideration continue to pay the sum of $2K per month, which would not be credited toward the Purchase Price, up through December 31, 2008. If closing did not occur then, the date would be automatically extended to June 1, 2009 and in consideration Mandrin agreed to pay $12.5K per month from January 15, 2009 through July 15, 2009, not credited toward the Purchase Price but in addition to it. Finally, the Third Amendment provides that if settlement did not occur by July 15, 2009, "all deposits and additional deposits paid by Buyer to Seller shall be non refundable and Buyer shall deliver to Seller all Buyer information and paperwork which it owns [sic] to Seller, whereupon this Agreement shall automatically terminate, and the parties hereto shall have no further obligation to each other, except as reserved in the original Agreement."

Settlement did not occur on July 15, 2009, and Mandrin did not make the $12.5K monthly payments from January 15, 2009 through July 15, 2009. These facts are uncontested.

Lynch filed a Complaint for breach of contract, seeking to recover the amount of $75K in damages from the six 2009 monthly installment payments of $12.5K, as well as interest, costs and attorneys fees. Mandrin has filed a motion to dismiss pursuant to Super. Ct. Civ. R. 12(b)(6) for failure to state a claim upon which relief may be based..

Standard of Review

On a motion to dismiss, all well-pleaded factual allegations are accepted as true; the Court must draw all reasonable inferences in favor of the non-moving party; and dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[2] To survive a motion to dismiss in a breach of contract case, the complaint must identify a contractual obligation, whether express or implied, a breach of that obligation by the defendant and resulting damage to the plaintiff.[3]

Discussion

The basic rule of contract construction gives priority to the intention of the parties.[4] Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.[5] When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meaning, there is ambiguity.[6] Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement

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[2] *In re General Motors Shareholder Litigation*, 897 A.2d 162, 168 (Del. 2005).

[3] *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203-04 (Del. Ch. 1988).

[4] *E.I. du Pont de Nemours and Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

[5] *Rhone-Poulenc v. American Motorists Ins.*, 616 A.2d 1192, 1196 (Del. 1992).

[6] *E.I. du Pont de Nemours and Co.*, at 1113.

where such inference runs counter to the agreement's overall scheme or plan.[7]

Paragraph 10.3 of the original Agreement sets forth the remedies available to Lynch in the event of default by Mandrin:

> If the Buyer defaults in its obligations to purchase the Property in accordance with the terms, covenants and provisions of this Agreement, the Seller shall be entitled after such default, as its sole and exclusive remedy at law or in equity, (a) **to retain the Deposit, which Deposit shall be forfeited to the Seller as liquidated damages**, and (b) buyer shall deliver all buyer's Information which it owns [sic] to Seller, whereupon this Agreement shall thereupon automatically terminate, and the parties hereto shall thereafter have no further obligation to each other hereunder except as otherwise expressly provided herein. **The parties hereto hereby agree that in the event of a default by the buyer the actual damages thereby incurred by the Seller would be difficult to measure, and that the buyer's forfeiture and the Sellers' retention of the Deposit and Buyer's Information, would in such circumstances represent reasonable compensation to the Seller on account thereof.** (Emphasis added.)

The Court finds that this clause is an unambiguous, and therefore valid liquidated damages clause, limiting the Plaintiffs' remedies to the retention of "the Deposit." Generally, courts will enforce liquidated damages provisions where the harm resulting from the breach is difficult to calculate in advance, the agreement is clear, and the amount in question is a reasonable amount.[8] Under the Agreement, the Deposit was $75K, which Mandrin paid and which Lynch has retained. The plain meaning of the language is not

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[7] *Id.*

[8] *United States ex rel. Eastern Prestressed Concrete Systems v. United Pacific Ins. Co.*, 1987 WL 27492 (E.D. Pa.) (citing *Co-Build Companies v. Virgin Islands Refinery,* 580 F.2d 492, 497 (3d. Cir. 1978)).

susceptible of any meaning other than that the parties agreed that Lynch's sole remedy would be to retain "the Deposit" and the buyer's information.[9] (The parties agree that the buyer's information has been turned over the Lynch.) They realized that a default could occur and that the Sellers' "actual damages would be difficult to measure." [10] For that reason, they entered into an agreement as to retention of "the deposit," or liquidated damages as opposed to actual damages.

The ambiguity arises when attempting to define the phrase "the Deposit." Does the phrase include only the $75K deposit referred to in the Agreement or does it also include the numerous deposits established in the three Amendments? Nothing in the contractual language of either the Agreement or the Amendments sheds light on the parties' intentions as to the answer to this question. The deposits are not difficult to measure, as are actual damages, because their amounts are specified, but that fact alone is not determinative. Mandrin has not challenged Lynch's right to retain the deposits set forth in the First and Second Amendment, or even the deposits actually made under the Third

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[9]Unlike the case of *Trapp v. Barley*, 897 S.W. 2d 159 (Mo.Ct.App. 1995), which allowed the recovery of actual damages where a liquidated damages clause was restricted to closing costs only, the clause here is broader, and the obligation to purchase in accordance with its terms, as amended, includes payments for an extended settlement date. Here, the Agreement provides that the "sole and exclusive remedy" for Seller after Buyer's default is to "retain the Deposit." Other courts too have found such language to reflect the parties' intention to precisely restrict the Seller's recovery. *See* 91 Am.Jur. Trials § 333.

[10]*See Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Development, LLC*, 2008 WL 3323926 (Del. Super.)(observing that a liquidated damages clause in contract indicated that parties were aware that deal might not go through and that clause was attempt to address that eventuality).

Amendment, which Mandrin paid with the exception of the final installments in 2009.[11] Mandrin challenges only the deposits promised to be made, but not made, from January 15, 2009 through July 15, 2009.

The disputed language appears in the Third Amendment:

> In the event closing has not occurred by December 31, 2008, then the closing date will be automatically extended to on or before June 1, 2009 and in consideration of this extension of the closing date, Buyer will pay Twelve Thousand Five Hundred Dollars ($12,500.00) per month (not credited toward the purchase price, but shall be in addition to the purchase price) beginning January 15, 2009 and continuing through July 15, 2009. If settlement has not occurred by July 15, 2009, then **all deposits and additional deposits** paid by Buyer to Seller shall be non refundable and Buyer shall deliver to Seller all buyer information and paperwork which it owns to Seller, whereupon this Agreement shall automatically terminate, and the parties hereto shall have no further obligation to each other, **except as reserved in the original Agreement.** (Emphasis added.)

The Court finds that in this case a reasonable person reading the quoted passage of the Third Amendment would be uncertain whether the "deposits" referenced therein were intended by the parties to be part of the deposit referenced in the liquidated damages clause in the Agreement or also included the deposits set forth in the Amendments. The quoted language in the Third Amendment, which is at the heart of the Complaint, is susceptible of more than one meaning. That is, the phrase "all deposits and additional deposits" might or might not have been intended by the parties to be part of the liquidated

[11]A party is generally permitted to retain the amount of money set aside under a liquidated damages clause where the agreement is clear that the parties had such an intention when entering into the agreement. *United States ex rel. Eastern Prestressed Concrete Systems v. United Pacific Ins. Co., supra*, at *1.

damages clause set forth in the Agreement. Nothing is reserved in the "original Agreement" other than the liquidated damages provision. The Court concludes that read together, the liquidated damages clause in the Agreement and the provisions for additional deposits in Third Amendment are ambiguous in that they are susceptible of more than one meaning.

The parties' intention as to which deposits are part of the liquidated damages provision is not clear from the contract language itself, and the Defendant's Motion to Dismiss the Complaint is therefore **Denied.**

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary